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No. 99-498

IN THE
Supreme Court of the United States

MICROSOFT CORPORATION, *et al.*,
Petitioners,
v.
DONNA VIZCAINO, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, AMERICAN STAFFING ASSOCIATION, ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, AND NATIONAL TECHNICAL SERVICES ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF MICROSOFT CORPORATION

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Information Technology Association of America, American Staffing Association, Association of Private Pension and Welfare Plans, and National Technical Services Association (collectively the "Employer Amici") respectfully move this Court, pursuant to Supreme Court Rule 37, to grant leave to file their brief, submitted herewith, as *Amici Curiae* in support of the Petition for Writ of Certiorari filed by Microsoft Corporation ("Microsoft").

Pursuant to Supreme Court Rule 37.2, the Employer Amici have obtained the consent of Petitioner Microsoft Corporation to the filing of their Brief *Amici Curiae*. However, Stephen Strong, Counsel for Respondents Donna Vizcaino, *et al.*, declined to consent to the filing of this Brief.

The Employer Amici are the leading trade associations in the information technology ("IT"), flexible staffing

and employee benefits fields. Information Technology Association of America ("ITAA") is a leading trade association of the companies that create and market products and services associated with computers, communications and data. ITAA's 11,000 direct and affiliate members encompass systems integration, professional services, telecommunications, Internet, electronic commerce, client-servers and custom software manufacturing. The IT industry's workforce currently totals over 2.5 million individuals, ten times that of the basic steel industry, and three times that of the automotive industry. IT is our country's number one export.

American Staffing Association ("ASA") is an industry association of firms that supply temporary help and other staffing services to businesses around the world. ASA is the nation's largest association of staffing supply firms. ASA members operate over 13,000 staffing offices, representing almost 75% of the staffing firm offices in the United States. Collectively, the staffing industry had approximately $60 billion in domestic temporary help revenue in 1998. It currently employs almost 3 million people in the United States on a daily basis and an estimated 15 million annually.

Association of Private Pension and Welfare Plans ("APPWP") is a broad-based, non-profit trade association which was founded in 1967 to protect and foster the growth of the private employer-sponsored employee benefit plan system in the United States. Its members include both small and large employer sponsors of employee benefit plans, as well as numerous plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers and other professional organizations. Collectively, it has more than 230 members who sponsor or administer plans covering more than 100 million plan participants.

National Technical Services Association ("NTSA") is comprised of companies that contract out their employees —qualified designers, drafters, engineers, computer programmers, systems analysts and other experienced professional technical personnel—to public and private businesses. Serving leading edge companies in a variety of industries such as IT, electronics, telecommunications, aerospace, biotechnology, pharmacology and financial services, NTSA member firms operate over 1,800 offices and employ more than 300,000 technical professionals nationwide and around the globe.

Flexible staffing arrangements play a vital role in American industry today. Businesses rely on flexible staffing arrangements to fill positions while employees are on leave, meet staffing needs during temporary growth spurts, or staff short-term projects that require specialized skills that their employees lack.

Flexible staffing is particularly common in the IT industry, where skilled workers may be brought into a business to address Y2K compliance, build or service computer networks or assist in developing software. Businesses will frequently turn to IT staffing firms because they lack the technical ability to evaluate or supervise IT workers. If a project has a limited time line or the client does not have sufficient work to keep skilled workers busy for the foreseeable future, flexible staffing firms may be the *only* practical source of personnel to accomplish the needed tasks.

Positions filled by staffing firm workers may last from a few days to more than a year. In some cases the client may supervise the details of the work—for example, when staffing firm employees perform clerical or administrative work. In other cases, however, particularly in IT fields, the staffing firm employee has a level of exper-

tise that precludes the client from supervising the details of the work performed. Nevertheless, even when the IT staffing firm "directs" a specific project, it may still be necessary for the client to coordinate when, where and how staffing firm employees are permitted to access the client's IT systems, in order to maintain the integrity and security of the client's records and assure that the staffing firm's work does not interfere with the client's ability to conduct business.

In May 1999, the Ninth Circuit ruled in *Vizcaino v. Microsoft Corp.*, 173 F.3d 713 (9th Cir. 1999) ("*Vizcaino III*"), that individuals performing services for a business through a staffing firm may be employees of *both* the staffing firm and the business that contracted for their services. Completely unprecedented in the employee benefits context, this "dual employer" status created by the Ninth Circuit exposes businesses that use staffing firm employees to lawsuits for retroactive employee benefit coverage by staffing firm employees who may already be receiving employee benefits from their staffing firms. The "dual employer" analysis is also entirely unworkable under the Internal Revenue Code.

Because of their role as the leading trade associations for industries that use or supply flexible staffing, the Amici have an understanding of the impact the *Vizcaino III* decision will have on these industries nationwide. The Amici's Brief sets forth the critical role that alternative workers play in the IT industry and the United States as a whole. It explains, from the Amici's unique perspective, the significant, adverse impact the newly created dual employer status will have on the businesses that provide flexible staffing services and on the industry segments that are significant consumers of staffing services.

The Brief, which consolidates the views of four leading trade associations troubled by the Ninth Circuit's decision,

also flushes out the deficiencies in the Ninth Circuit's substantive analysis of the plaintiffs' employment status for employee benefit purposes, revealing its conflict with Internal Revenue Code provisions enacted by Congress. The Employer Amici believe that their Brief will impress upon the Court the importance of this case to flexible staffing firms, and to United States employers generally, and the critical need for this Court to grant Microsoft's Petition for Writ of Certiorari.

This motion is timely filed pursuant to Supreme Court Rule 37.2.

For the foregoing reasons, the Employer Amici respectfully request that the Court grant them leave to file their Brief *Amici Curiae* in support of Microsoft's Petition for Writ of Certiorari.

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*

Information Technology Association of America, American Staffing Association, Association of Private Pension and Welfare Plans, and National Technical Services Association (collectively the "Employer Amici") respectfully submit this Brief *Amici Curiae* [1] in support of the Petition for Writ of Certiorari filed by Microsoft Corporation ("Microsoft").

[1] This brief was authored in whole by counsel for the Employer Amici, Seyfarth, Shaw, Fairweather & Geraldson.

Information Technology Association of America ("ITAA") is a leading trade association of the companies that create and market products and services associated with computers, communications and data. ITAA's 11,000 direct and affiliate members encompass systems integration, professional services, telecommunications, Internet, electronic commerce, client-servers and custom software manufacturing. The information technology ("IT") industry's workforce currently totals over 2.5 million individuals, ten times that of the basic steel industry, and three times that of the automotive industry. IT is our country's number one export.

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Flexible staffing arrangements play a vital role in American industry today. When businesses need to fill positions while employees are on leave, meet staffing needs during temporary growth spurts, or staff projects that require specialized skills that the businesses' employees lack, staffing arrangements provide them with the necessary manpower to keep their organizations efficient and profitable.

Flexible staffing is particularly common in the IT industry, where skilled workers may be brought into a business to address Y2K compliance, build or service computer networks or assist in developing software. If a project has a limited time line or the client does not have sufficient work to keep skilled workers busy for the foreseeable future, staffing firms may be the *only* practical source of personnel to accomplish the needed tasks.

Positions filled by staffing firm workers may last from a few days to more than a year. In some cases the client may oversee the details of the work—for example, when staffing firm employees perform clerical or administrative work. In other cases, however, particularly in IT fields, the staffing firm employee has a level of expertise that precludes the client from supervising the details of the work performed. Nevertheless, even when the IT staffing

firm "directs" a specific project, it may still be necessary for the client to coordinate when, where and how staffing firm employees are permitted to access the client's IT systems, in order to maintain the integrity and security of the client's records and assure that the staffing firm's work does not interfere with the client's ability to conduct business.

The decision of the Ninth Circuit in *Vizcaino v. Microsoft Corp.*, 173 F.3d 713 (9th Cir. 1999) (the "Opinion" or "*Vizcaino III*"), if left standing, would make many staffing firm employees the "joint employees" of both the staffing firm and its clients for employee benefit purposes. This newly-created "dual employment" doctrine will expose businesses that use staffing firm employees to lawsuits for employee benefits brought by staffing firm employees who may already be receiving employee benefits from their staffing firm. It will also fundamentally undermine how the employee benefit provisions of the Internal Revenue Code apply to staffing firms and their clients.

SUMMARY OF ARGUMENTS

The Ninth Circuit's ruling in *Vizcaino III* is the first court decision to hold that an individual performing a single job for a single compensation package may be considered to be employed by two unrelated employers for purposes of the employee benefit provisions of the Internal Revenue Code, 26 U.S.C. §§ 401-424 ("Code"). This holding, if left standing, would destroy the legal standards and guidelines on which United States businesses have heretofore based their flexible staffing arrangements. As a result, the Opinion exposes the thousands of businesses that use staffing firm employees for legitimate business reasons to lawsuits for retroactive employee benefit coverage by plaintiffs looking for a windfall.

The Ninth Circuit's "dual employer" analysis is directly contrary to the design of the employee benefit provisions of the Code and to the Congressional intent underlying these provisions. The Opinion effectively repeals the carefully considered provisions of the Code relating to employee leasing and fundamentally undermines the limitations in the Code governing tax-qualified retirement plans.

The Employer Amici urge the Court to grant certiorari to prevent the disruption of a substantial business sector of the U.S. economy and to preserve the integrity of the Code provisions governing employee benefits.

ARGUMENTS

I. THE OPINION CREATES A CAUSE OF ACTION FOR STAFFING FIRM WORKERS TO SEEK WINDFALL, DUPLICATIVE EMPLOYEE BENEFIT COVERAGE.

The Ninth Circuit's ruling in *Vizcaino III* is the first court decision to hold that an individual performing a single job for a single compensation package may be employed by two unrelated employers for purposes of the employee benefit provisions of the Code. Relying upon this Court's application of common law agency principles in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1982), the Ninth Circuit held that

> even if for some purposes a worker is considered an employee of the agency, that would not preclude his status of common-law employee of Microsoft. The two are not mutually exclusive.

Vizcaino III, 173 F.3d at 723. The *Darden* Court, however, was careful to determine that applying "traditional agency law principles would [not] thwart the congressional design or lead to absurd results" under the applicable statute. *Darden*, 503 U.S. at 323. The Ninth Circuit's cre-

ation of a "dual employer" status under the employee benefit provisions of the Code does exactly that.

Many employees of flexible staffing firms receive employee benefits from the staffing firms which employ them. For example, the Bureau of Labor Statistics has estimated that 57.9% of full-time workers provided by contract firms (staffing firms that typically provide technical services to their customers) have employer-provided health insurance; and 54.9% of such workers are offered employer-sponsored retirement plans. Bureau of Labor Statistics, U.S. Department of Labor, News Release, U.S.D.L. 90-422, *Contingent and Alternative Employment Arrangements, February, 1997, Labor Force Statistics from the Current Population Survey (December 2, 1997).*[2]

By holding that staffing firm employees may simultaneously be employees of the staffing firm and the client firm for employee benefit purposes, the Ninth Circuit permits such employees to recover benefits from *both* of the "dual employers" with respect to the same compensation stream, or to pick and choose their employee benefits from among the array of plans offered by each. The Opinion exposes the thousands of businesses that use staffing firm employees for legitimate business reasons to lawsuits for retroactive employee benefit coverage by plaintiffs looking for a windfall.

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[2] In fact, Code Section 414(n), 26 U.S.C. § 414(n), provides a significant incentive for staffing firms to provide retirement plan benefits, by allowing leased employees in certain "safe harbor" pension plans to be excluded from consideration in testing the client's retirement plans for compliance with Code requirements.

II. THE OPINION IS DIRECTLY CONTRARY TO THE DESIGN OF THE EMPLOYEE BENEFIT PROVISIONS OF THE CODE AND TO CONGRESSIONAL INTENT.

Congress has explicitly, and repeatedly, addressed flexible staffing and leased employee arrangements for employee benefit purposes in Section 414 of the Code.[3] Yet the Ninth Circuit's "dual employer" analysis ignores both the statutory framework and the case law interpreting it. By ignoring the impact of the triangular relationship between staffing firm, employee and client, *Vizcaino III* applies a bludgeon to staffing and leased employee arrangements where Congress chose to use a scalpel.[4] As a result, the court has done enormous damage to the federal tax laws governing employee benefits.

Section 414(n) of the Code governs the treatment of leased employees for purposes of most tax-favored employee benefit plans, including qualified retirement plans, life and health insurance and employee fringe benefits. Under Section 414(n), a "leased employee" is defined as "any person who is not an employee of the recipient and who provides services to the recipient," if (1) the worker has performed services for the recipient on a substantially

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3 The Opinion purports to apply a common law definition of employment status to an employee stock purchase plan governed by Section 423 of the Code. Because other provisions governing employee benefits in the same part of the Code similarly look to common law to determine employment status, the Opinion will have an extraordinarily broad application. *See* 26 U.S.C. §§ 401-424.

4 As discussed in the text, Congress was well aware of the complex issues relating to employee staffing arrangements and addressed them explicitly in Section 414(n) of the Code. In addition, Congress authorized the Secretary of the Treasury to prescribe regulations necessary to prevent the avoidance of employee benefit requirements "through the use of—(1) separate organizations, (2) employee leasing or (3) other arrangements." 26 U.S.C. § 414(o).

full-time basis for at least one year,[5] and (2) the services are performed "under primary direction or control" of the service recipient. 26 U.S.C. § 414(n)(2), *as amended by* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1454, 110 Stat. 1755, 1817 (1996). An individual who is treated as a leased employee under Section 414(n) must be treated as the employee of the service recipient for specified employee benefit testing purposes. 26 U.S.C. § 414(n)(2). However, other than for these specified testing purposes, Section 414(n) contemplates that a leased employee remains an employee of the leasing organization (and not of the service recipient), and does not require that a leased employee be permitted to participate in the service recipient's employee benefit plans. I.R.S. Notice 84-11, Q&A-14, 1984-2 C.B. 469, 471.

The Opinion renders Section 414(n) of the Code a nullity. On its face, Section 414(n)(2) does not apply to an individual who is the common law employee of the service recipient. *Burrey v. Pacific Gas & Elec. Co.*, 159 F.3d 388 (9th Cir. 1998). At the same time, it defines a leased employee as an individual "under primary direction or control" of the service reciepent—a circumstance that under the Ninth Circuit's "dual employer" analysis would necessarily make the individual the employee of the service recipient.[6] If the "dual employer" analysis

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[5] In contrast, the Ninth Circuit's "dual employer" analysis would appear to apply from the first day worked by a staffing firm employee.

[6] Specifically, the Court held:

> In a series of letters, the IRS advised Microsoft that ". . . It is our conclusion that Microsoft either exercised, or retained the right to exercise, direction over the services performed. This control establishes an employer-employee relationship." *Vizcaino I*, 97 F.3d at 1190 n.2. The IRS determinations allow

were the law, there could be no occasion on which an individual would ever be both subject to the service recipient's "primary direction or control," and also not an employee of the service recipient. Thus, the Ninth Circuit's analysis judicially repeals Section 414(n).

The Ninth Circuit not only failed to consider the impact of its "dual employer" concept on the statute affected, it directly contravened the Congressional intent underlying the statute. Congress adopted the current "primary direction or control" standard in Section 414(n)(2) of the Code as part of the Small Business Job Protection Act of 1996, P.L. 104-188, § 1454(a), 110 Stat. 1755, 1817 (1996). The legislative history to this provision makes it clear that Congress rejected the very presumption of employment status based solely on control that the Ninth Circuit adopted:

> The fact that a person is or is not found to perform services under primary direction or control of the recipient for purposes of the employee leasing rules is not determinative of whether the person is or is not a common-law employee of the recipient.

S. Rep. No. 104-281, at 93 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1474, 1567.

Rather, Congress assumed, correctly, that a worker supplied by a staffing firm may, under common law, be the employee of the staffing firm, *and not that of the service recipient*, notwithstanding that the service recipient controls the worker's performance:

> For example, an individual who works under the direct supervision of the service recipient would be

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no exception for individuals in these positions on the grounds that they may be on the payroll of employment agencies. *Vizcaino III*, 173 F.3d at 724.

> considered to be subject to primary direction or control of the service recipient even if another company hired and trained the individual, had the ultimate (but unexercised) legal right to control the individual, paid his wages, withheld his employment and income taxes, and had the exclusive right to fire him. *Thus, for example, temporary secretaries, receptionists, word processing personnel and similar office personnel who are subject to the day-to-day control of the employer in essentially the same manner as a common-law employee are treated as leased employees if the period of service threshold is reached.*

S. Rep. No. 104-281, at 93-94 (1996), *reprinted in* 1996 U.S.C.C.A.N. 1474, 1567-1568 (emphasis added).

The Opinion also undermines other Code provisions that expressly limit the amount of tax-favored employee benefits an employee may receive under an employer's retirement plan. For example, Section 401(a)(17) of the Code limits the amount of an employee's compensation that may be taken into account for purposes of a qualified retirement plan in any year. *See* 26 U.S.C. § 401 (a)(17). For 1999, this limit is $160,000. Because this limitation does not require the aggregation of benefits provided by *unrelated* employers' retirement plans, Treas. Reg. § 1.401(a)(17)-1(c)(3), the Ninth Circuit's ruling will permit a highly paid employee to receive duplicate benefits, on the same $160,000 of compensation, simply by covering the employee in both a staffing firm plan and a client plan. The overall limitation on qualified retirement plan benefits in Section 415 of the Code, as well as the allocation of employer deductions, can be similarly manipulated under the Ninth Circuit's analysis. *See* 26 U.S.C. §§ 404 and 415. Such manipulation would not be possible if the employee at issue was the employee of *either* the leasing organization *or* the client receiving the services, rather than the employee of both.

In *Packard v. Commissioner*, 63 T.C. 621 (1975), the United States Tax Court specifically rejected the argument that individuals covered by a qualified retirement plan could be employed by both a corporation and a related partnership, based on the potential for abuse:

> We do not believe recognition of such a dual capacity is logical, particularly from a tax accounting standpoint. . . . We can only wonder whether if the partnership had attempted to cover these employees under its profit-sharing plan the respondent [IRS] would have permitted the partnership to deduct its contributions in their behalf if all other circumstances were the same.

Id. at 632. As demonstrated above, the Tax Court's concern regarding the impact of dual employment status on the integrity of the Code provisions governing employee benefits is well founded.

By determining that staffing firm employees may be joint employees of a staffing firm and its clients for employee benefit purposes, without taking into account the real legal and economic significance of the flexible staffing relationship or the legislative intent underlying the affected statutory provisions, the Ninth Circuit's ruling in *Vizcaino III* creates a new test of common law employment for employee benefit purposes that dramatically and adversely affects firms that place flexible staffing employees and the firms that utilize them.

CONCLUSION

For the reasons set forth above, we respectfully urge this Court to grant Microsoft's Petition for Writ of Certiorari.

Respectfully submitted,

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